



# European Union

## EU Export Control on Dual Use Items

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### Summary

The new EU Council Regulation 428/2009 sets up an EU wide regime for the control of exports of dual-use items and technology, and replaces the former Regulation 1334/2000. The new Regulation defines a common list of dual-use items which are controlled for transfer, export, brokering and transit. The Regulation is a directly applicable law throughout the EU and is enforced by its 27 Member States. The European Commission is responsible for verifying the correct implementation of the EU Regulation, while national export control authorities remain responsible for deciding on applications for export authorizations. Notable inclusions to the regulation are the introduction of controls on brokering services of dual-use items and specific provisions for the prohibition of certain transits of dual-use items on the EU territory based on certain restricted end-uses. The Regulation implements Member State and EU international commitments to enforce export controls on dual-use items.

### Implications from a U.S. perspective:

1. American brokers established in an EU Member State will be bound to obtain authorizations from the Member State in which they are established to perform brokering services as per the EU Regulation. Control on brokering is on an adhoc basis. Individual EU Member States can extend controls to non-listed items. Therefore brokers established in the EU should check national legislation where they are established.
2. American dual-use items transiting through EU territory en route to a destination outside the EU will be subject to new provisions on transit if there is a serious risk of WMD diversion.
3. The export of most of European dual-use items to the U.S. is facilitated through the use of the Community License (CGEA EU001).

### Background

Dual-use items (including software and technology transfers by all means) are civil items which may be used for military purposes. Since a judgment of the European Court of Justice in 1995 which declared that the export controls of dual-use items falls within the common commercial policy, the Council adopted the first Dual Use Regulation 1334/2000. Since August 27 2009, it has been replaced by EU Council Regulation 428/2009, known as the "Recast Regulation".

The basic principle of the EU wide regime is that all dual-use items (except the most sensitive ones listed in Annex IV of the Regulation) are only subject to control when they are to be exported from the European Union, but may circulate freely within the EU. This is in line with the EU Treaty that establishes a single market for civil items and underscores

the goal of the EU to lower control barriers at the internal-EU level, while heightening them as items leave EU territory. These controls are designed in particular to prevent the proliferation of weapons of mass destruction (WMD) or undue accumulation of conventional arms in line with the EU MS obligations under international treaties, and in particular, they meet the objectives set by United Nations Security Council Resolution 1540, adopted in 2004. The EU Dual Use List implements Member State international commitments under the Wassenaar Arrangement, the Missile Technology Control Regime (MTCR), the Nuclear Suppliers' Group (NSG), the Australia Group and the Chemical Weapons Convention (CWC).

EU Regulation 428/2009 is thereafter called "the Regulation". The term "exports" only refers to exports *outside the EU*, while "transfers" refers to movements *between EU Member States*.

### The 4 types of EU export licenses

There are four types of export authorizations referred to in the Regulation:

- 1. Community General Export Authorization (CGEA) No EU001: allows the export of most dual-use items to seven countries by any exporter respecting the conditions of use attached to the CGEA: the United States, Canada, Japan, Australia, New Zealand, Switzerland and Norway. The CGEA is generally known as a "Community License", and is valid in all EU Member States, which means that a company established in one Member State may export from that country or from any other Member State under the CGEA, providing it complies with the CGEA conditions. Exporters must be registered in an EU Member State with a national export control agency in order to use a CGEA and must check specific conditions of use that may be adopted at national level (in conformity with Annex II part 3 of the Regulation).

Restrictions which apply to the use of a CGEA usually include: unauthorized export if the end-use is for military purposes, or if connected with WMD, or if the destination is located within a customs free area. Obligation for complying with national registration and reporting requirements is defined by each Member State. The CGEA remains valid until it is amended. Other obligations for exporters that apply under the Regulation do apply for the use of CGEA like approvals such as record keeping requirements for those transactions.

- 2. National General Export Authorization: granted only by certain Member States for certain exports of non-sensitive dual-use items to certain destinations and available to exporters who meet the national requirements according to Article 9 of the Regulation. Currently, only 6 EU Member States implement these licenses (UK, Germany, France, Italy, Netherlands, Greece).
- 3. National Global Export Authorization: granted to one specific exporter for a category of dual-use items valid for export to one or more specified end-users or countries;
- 4. National Individual Export Authorization: granted to one specific exporter for one end user or consignee in a third country and covering one or more dual-use items.

Contrary to the three other authorizations, the CGEA is not issued by national authorities, but is published in Annex II of the Regulation, and is known as a "Community License".

National authorities take the final decision as to whether to grant a national general, global or individual export license. The Regulation requires the Member States to process applications within a defined period to be determined by national law. This should increase the transparency and predictability of decisions on export applications.

## Basic principles

The principle of the EU dual-use control regime is that non-sensitive dual use items may circulate without a license *as long as they stay within the EU*. The Regulation includes the “EU Dual Use List” which is divided in annexes according to the level of sensitivity of the items. Annex 1 lists the non-sensitive items that circulate in the EU without prior authorization but need an export license to leave the EU customs territory. Annex 4 lists the items that are subject to licensing prior to any transfer even within the EU. A “catch all” article sets provisions that shall apply to cases concerning dual-use items not listed in the common EU Dual-Use List. Some Member States may apply intra-Community controls on items under circumstances listed in article 22 of the Regulation.

## The EU Dual-Use List: in the Annexes to the Regulation

### 1. Non-sensitive dual use items: free intra-EU trade; controlled at export

All non-sensitive items on the EU Dual Use List that are under the *Annex 1* may be transferred without a license between EU member states (Annex 1 lists only non- or less sensitive items.) However, they do need an export license if they leave the EU customs territory.

A Member State may also decide to require an export license for additional items that are not on this list (such items may be publicly available to exporters – in conformity with Article 8 of the Regulation - or may be decided on a ad hoc basis prior to the export by certain exporters under certain circumstances listed in article 4 of the Regulation). All export authorizations granted by Member States or by the EU are valid across the EU.

There are 9 categories in Annex 1: (0) Nuclear materials, facilities and equipment; (1) Special materials and related equipment; (2) Materials processing; (3) Electronics; (4) Computers<sup>1</sup>; (5) Telecoms and Information society; (6) Sensors and lasers; (7) Navigation and avionics; (8) Marine; (9) Aerospace and Propulsion.

### 2. Sensitive and Most Sensitive dual-use items: controlled both in intra-EU trade and at export

Annex 4 of the Regulation lists two categories of dual-use items: the sensitive and the most sensitive items, which require both a transfer license to move between EU Member States and an export license in all cases when they leave the EU territory.

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<sup>1</sup> The transmission of software and technology by means of electronic media, fax, or telephone to destinations outside the EU is included in the export control.

Sensitive dual-use items are divided in two categories:

- Part 1 lists specific “sensitive items” for which a transfer license is needed, and for which a “National General Authorization for Intra-Community Trade” (or transfer) may be delivered, if the national authorities of a particular member state decide to allow it, adding as appropriate, re-export conditions to be respected by all subsequent recipients/transferrers within the EU. An export license is also required if the item leaves the EU territory. The European Commission reports that no Member State has adopted any National General Authorization for intra-Community trade of these items.

- Part 2 lists the “most sensitive items” for which a transfer license is needed, but for which national authorities are not allowed to issue “National General Authorizations for Intra-Community Trade” transfers. Those are the most sensitive dual-use items, which require an Individual transfer license for each transfer between EU Member States, again with the appropriate re-export conditions to be respected by the recipients.

An export license is needed if the item leaves the EU territory in all cases.

Member States may add controls for items that are not on the EU Dual Use List (France, Germany, U.K. and Latvia currently have additional lists) as they see appropriate under Article 8, but such controls must be notified to the European Commission and subsequently published in the EU Official Journal. National control of non-listed dual-use items is also provided for under the “catch-all clause” or end use control under Article 4 of the Regulation.

### **New: Control on brokering activities**

The Regulation introduces controls on brokering services, only to the extent that there is a serious risk of WMD diversion. These provisions apply to brokers who are legally established in an EU Member State, whatever their nationality. Therefore, an American national established as a broker in an EU Member State has to request an authorization for brokering services from the administration of the country where he is legally registered.

The Regulation requires authorizations for:

- the negotiation of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country;
- the selling or buying of dual-use items that are located in third countries for their transfer to another third country.

The provision of ancillary services (defined as transportation, financial services, insurance, re-insurance or general advertising or promotion) is not covered under the definition of brokering services.

### **New: Control on transit**

The new Regulation introduces the possibility for national authorities to prohibit the transit of *non-EU dual use items* entering the EU customs territory and having a destination outside the EU, only if there is suspicion of a serious risk of WMD diversion or if the item is suspected to be intended for proliferation of WMD in a third country. The transits concern “those items which are not assigned a customs-approved treatment or use other than the

external transit procedure or which are merely placed in a free zone or free warehouse and where no record of them has to be kept in an approved stock record". (EU Regulation Recital 16). Member States may extend the application of the "catch-all" provisions to transit for non-listed items for WMD use and for dual-use items for military end-use in a country subject to an arms embargo.

## **Enforcement and denials**

In certain circumstances, particularly for individual export authorizations that cover items located in a different EU Member State than the one where the exporter is established, the Member State receiving the request for export application must be in agreement with the Member State where the items are located. If a Member State feels that its essential security interests are threatened by a particular export, it may request another Member State not grant an export authorization or, if already granted, request its annulment, suspension or modification. It may also do so for authorizations it has delivered to exporters established in its own country. The Regulation insists Member States take internal compliance programs into account when assessing applications, and focuses on increased coordination within the EU.

Regarding enforcement, the EC Directorate-General for Trade, which is responsible for the EU dual-use export control regime, is active in areas related to the enforcement of the Regulation, and works with other EC directorate-generals such as Taxation and Customs. A "Coordination Group" chaired by the EC and with participation of all Member States experts examines all relevant questions linked to the application of the Regulation and in some cases can consult with exporters and relevant stakeholders. The European Commission currently is organizing peer reviews on focused areas of the Regulation, and DG Trade is developing a training program for the Member States. Each member state is responsible for taking appropriate measures to ensure proper enforcement of the EU Regulation; however a number of issues are addressed at the EU level, like the implementation of the Customs Code and its security amendments. The penalties, decided at national level, "must be effective, proportionate and dissuasive" (EU Regulation Article 24).

According to the European Commission, the EU system shows a high rate of dual-use export license denials. The EC wants to ensure that the information about denials is shared between all EU Member States in a more convenient but fully secured fashion, using modern technology. To this aim, the EC is finalizing details of a secure on-line denials database for member state authorities, with the first tests to be finalized in the fall of 2010. Common export risk analysis patterns will likely be adopted. But because the European Commission does not enjoy membership in MTCR or Wassenaar, the EC has no access to denials issued in non-EU countries, and therefore cannot issue a full broad-range database.

Finally, the Regulation also contains enhanced provisions on the exchange of information between Member States and the EC. It explicitly requires the Member States to check the denials database for similar or identical transactions before granting an authorization, and provides for direct cooperation and exchange of information between competent administrations about exporters deprived of licenses or suspicious end-users.

## **Impact on U.S.-controlled items**

Due to the extraterritoriality of the US export control laws, the European control regime may in some cases present incompatibilities with the transfer of U.S.-controlled elements towards EU countries. Some U.S.-controlled dual use items are not allowed to be transferred to EU Member States other than those specified in a U.S. export license, or may only be transferable to one or two specified member states. This contradicts both the EU Treaty providing for the single market and the EU Dual Use Regulation, which provides for free intra-EU circulation of most items (i.e. those in Annex 1); the European system that incorporates such dual use components should then be allowed to circulate without a license throughout the EU. This situation may create intra-EU blockages that contribute to an avoidance of the use of certain U.S.-controlled elements.

## **EC proposal for additional CGEAs**

In December 2008, the EC proposed to increase the number of CGEAs from one to seven (Commission proposal (2008)854) in order to facilitate the trade of certain non-sensitive items exported towards certain non-sensitive countries, which are currently mainly covered by some of the Member State National General Export Authorizations (UK and Germany in particular). Contrary to the existing CGEA EU001 which only authorizes exports to the U.S. and six other destinations, the proposed new CGEAs may cover in some cases a few items but a large number of destinations while others may cover more items but very few countries of destination. The six new CGEAs would cover: low value shipments, exports after repair/replacement, temporary export for exhibition of fair, computers and related equipment, telecoms and info security, and chemicals.

According to the EC, "there is a lack of transparency across Member States regarding both the scope and conditions of use of national general export authorizations."<sup>2</sup> The situation for exporters which may be denied the use of such NGAs is not transparent. This leads to regulatory treatment of certain exports that benefit businesses established in one Member State at least partly at the expense of businesses established in other Member States, and is not in the best interests of the Community as a whole. The discrepancy between national authorizations is particularly difficult to manage for companies established in several Member States. Therefore, the EC hopes to simplify the current legal system with the new Regulation, and establish a level playing field for all EU exporters when they export certain items to certain destinations.

## **Weblinks**

European Commission/ Directorate General for Enterprises: EU Dual use policy website;  
[http://ec.europa.eu/trade/creating-opportunities/trade-topics/dual-use/index\\_en.htm](http://ec.europa.eu/trade/creating-opportunities/trade-topics/dual-use/index_en.htm)

EU Council website on Dual Use Technology control  
<http://www.consilium.europa.eu/showPage.aspx?id=408&lang=en>

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<sup>2</sup>Explanatory Memorandum 2008/0249 (ACC) to Document COM (2008)854 Final

**For More Information:**

The U.S. Commercial Service at the U.S. Mission to the European Union is located at Boulevard du Regent 27, Brussels BE-1000, Belgium, and can be contacted via e-mail at: [brussels.ec.office.box@mail.doc.gov](mailto:brussels.ec.office.box@mail.doc.gov); or by visiting the website: [www.buyusa.gov/eu](http://www.buyusa.gov/eu). You can locate the nearest U.S. Export Assistance Center or Commercial Service offices throughout Europe by visiting [www.buyusa.gov](http://www.buyusa.gov) and [www.buyusa.gov/europe](http://www.buyusa.gov/europe).

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